APPEAL NO. 040573
FILED MAY 6, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on February 12, 2004. The hearing officer determined that: (1) the respondent (claimant) sustained a compensable injury in the form of an occupational disease; (2) the claimant had disability resulting from the compensable injury, beginning on April 17 and continuing through December 8, 2003; (3) the date of injury (DOI) is _____; (4) the appellant (carrier) is not relieved from liability under Section 409.002 because the claimant timely notified the employer pursuant to Section 409.001; and (5) although the claimant did not have good cause for failing to submit to the required medical examination (RME) appointment with Dr. B on June 25, 2003, the claimant is entitled to temporary income benefits (TIBs) from June 25 through August 20, 2003, because the carrier failed to schedule an appointment within 30 days. The carrier appealed, arguing that the hearing officer "abused his discretion in that the decision of the hearing officer is so against the great weight and preponderance of the evidence as to be unfair and manifestly unjust." The claimant responded, urging affirmance.

DECISION

Affirmed in part, reversed and rendered in part.

The hearing officer did not err in making the complained-of injury, disability, DOI, and notice determinations. The determinations involved questions of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). In view of the evidence presented, we cannot conclude that the hearing officer's determinations are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer erred in determining that the carrier failed to schedule the RME appointment within 30 days. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(b) (Rule 126.6(b)) provides, in part, that all examinations ordered must be scheduled to occur within 30 days after receipt of the order, with at least 10 days notice to the employee. Rule 102.5(d) provides, in part, that:

> For purposes of determining the date of receipt for those written communications sent by the [Texas Workers' Compensation Commission (Commission)] which require the recipient to perform an action by a specific date after receipt, unless the great weight of evidence indicates otherwise, the Commission shall deem the received date to be five days

> after the date mailed; the first working day after the date the written communication was placed in a carrier's Austin representative box located at the Commission's main office in Austin as indicated by the Commission's date stamp; or the date faxed or electronically transmitted.

In evidence is a [RME] Notice or Request for Order (TWCC-22) with a stamp that states "PLACED IN AUSTIN REP'S BOX May 23, 2003." Applying Rule 102.5(d), the carrier's first working day after Friday, May 23, 2003, the date the written communication was placed in a carrier's Austin representative box, was Tuesday, May 27, 2003. We note that Monday, May 26, 2003, was Memorial Day, a national holiday. *See* Rule 102.3(b). A letter dated May 30, 2003, reflects that the RME appointment was scheduled for June 25, 2003. The evidence reflects that the RME appointment was scheduled within 30 days in accordance with Rule 126.6(b). The hearing officer failed to apply Rule 102.5(d) to the facts of this case in determining that the date of receipt of the TWCC-22 was May 23, 2003. Accordingly, we reverse the hearing officer's Finding of Fact No. 6 that the carrier's Austin representative received the approved TWCC-22 on May 23, 2003, and render a new decision that the date of receipt of the TWCC-22 was on May 27, 2003.

The hearing officer erred in determining that the claimant is entitled to TIBs from June 25 through August 20, 2003. Rule 126.6(h) provides that a carrier may suspend TIBs, during and for a period in which the employee fails to submit to an RME unless the Commission determines that the employee had good cause for the failure to submit to the examination. Given our determination above and the hearing officer's unappealed finding that the claimant did not have good cause for failing to attend the RME appointment, we likewise reverse the hearing officer's TIBs determination. We reverse the hearing officer's decision that although the claimant did not have good cause for failing to submit to the medical appointment with Dr. B on June 25, 2003, the claimant is entitled to TIBs from June 25 through August 20, 2003, and render a new decision that the claimant is not entitled to TIBs from June 25 through August 20, 2003, because the claimant did not have good cause for failing to attend the RME appointment on June 25, 2003.

The hearing officer's decision and order is affirmed in part and reversed and rendered in part.

The true corporate name of the insurance carrier is **AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Veronica L. Ruberto
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Edward Vilano
Appeals Judge